Chicago-Kent Law Review

Volume 68
Issue 1 *Chicago-Kent Dedication Symposium*

Article 33

December 1992

Kotecki v. Cyclops Welding Corp.: The Efficacy of a Limited Contribution Rule and Its Effect on Good Faith Settlements

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KOTECKI V. CYCLOPS WELDING CORP.: THE EFFICACY OF A LIMITED CONTRIBUTION RULE AND ITS EFFECT ON GOOD FAITH SETTLEMENTS

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I. INTRODUCTION

The relationship between the workers' compensation and contribution doctrines has always been tense and difficult.[1] Indeed, in Illinois a debate over how to accommodate the various interests and policies supporting the Workers' Compensation Act[2] and the Contribution Among Joint Tortfeasors Act[3] (Contribution Act) has raged since the right to contribution was first recognized by the Illinois Supreme Court in 1977.[4] At its essence, this argument has focused on the tension between the Workers' Compensation Act's no-fault, exclusive remedy system and the Contribution Act's distribution of liability according to proportionate fault. This debate has been described as "the most evenly-balanced con-

* The author wishes to express thanks to Professor Jonathan B. Mintz and Professor Jacob I. Corre for their helpful remarks and suggestions throughout the preparation of this article.

1. *See* 2B ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 76, at 14-644 (1989).

2. ILL. REV. STAT. ch. 48, para. 138.5, 138.11 (1991), which reads in pertinent part:

> Section 5. (a) No common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury.
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> Section 11. The compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility of any employer engaged in any of the enterprises or businesses enumerated in Section 3 of this Act. . . .

3. ILL. REV. STAT. ch. 70, para. 302 (1991), which reads in pertinent part:

> 302. Right of contribution. (a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them. (b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is liable to make contribution beyond his own pro rata share of the common liability.

4. Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978) [hereinafter *Skinner*].

troversy in all of workmen's compensation law. . . ."[5] The difficulty in resolving the differences between the workers' compensation and contribution schemes has resulted in a variety of contribution rules throughout the states. These rules range from an emphasis on the workers' compensation scheme (i.e. no-contribution rule),[6] to an emphasis on the contribution scheme (i.e. unlimited contribution),[7] to an attempt to equitably accommodate both schemes (i.e. limited contribution).[8]

The following hypothetical illustrates how the conflict between the statutory schemes arises: Worker, a machinist employed by Acme Co., is injured on the job while working on a power press manufactured by Smith, Inc. Following his injury, Worker files for his compensation benefits from Acme Co. and soon receives $50,000. Upon consultation with his attorney and discovering that the power press contained a manufacturing defect, Worker sues Smith, Inc., alleging negligence in manufacturing design and strict products liability. As this suit proceeds, Smith, Inc. discovers that Acme Co. had altered the power press without consulting Smith, Inc. prior to Worker's accident. Thus, Smith, Inc. brings a third-party action against Acme Co. for contribution, alleging Acme's negligence.

The case goes to trial and results in a jury verdict. The jury determines that Worker was damaged in the amount of $1,000,000 and that the parties' comparative fault was as follows: Smith, Inc. - 25%; Acme Co. - 75%; Worker - 0%. Because Illinois places responsibility for paying damages on all parties found at fault (under the concept of joint and several liability), both Smith, Inc. and Acme are potentially liable for the entire damage amount.

However, a different conclusion would result if settlement is reached before the case is sent to the jury. It is possible that before the jury reaches a verdict, Acme Co. engages in settlement negotiations directly with Worker. Worker agrees to a settlement with Acme Co. in exchange for a waiver of its workers' compensation lien[9] against any recovery Worker may obtain from Smith, Inc. Pursuant to the Contribution Act, the court determines that the settlement was in good faith and thus dis-

5. Arthur Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 NW. U. L. REV. 351, 351 (1970).

6. *See infra* notes 84-89 and accompanying text.

7. *See infra* notes 90-97 and accompanying text.

8. *See infra* notes 98-103 and accompanying text.

9. Under ILL. REV. STAT. ch. 48, para. 138.5(b) (1991), employers paying workers' compensation benefits are entitled to a lien against the recovery of the injured employee-plaintiff from the defendant approximately equal to the amount paid in such benefits.

A waiver of this lien would entitle the plaintiff to keep this money, rather than paying it to the employer.

misses Acme Co. from the case, preventing any contribution action against it.

This case gives rise to a number of important, controversial issues including:

1) whether Smith, as the manufacturer, must shoulder the entire damage burden, following the jury verdict, because the Workers' Compensation Act may grant immunity to Acme;

2) whether Acme must pay an amount in contribution equal to its full proportionate share of the liability found by the jury if it does not settle;

3) whether any limit is placed upon the amount of Acme's potential contribution by the Workers' Compensation Act; and

4) whether Acme's settlement is likely to be found in good faith by the court as required by the Contribution Act, thus cutting off Smith's right to contribution from Acme.

On April 18, 1991, in *Kotecki v. Cyclops Welding Corp.*,[10] the Illinois Supreme Court addressed the apparent conflict between the Illinois statutory workers' compensation and contribution provisions. Specifically, the court addressed "whether an employer, sued as a third-party defendant in a products liability case, is liable for contribution in an amount greater than its statutory liability under the Workers' Compensation Act."[11] In providing an answer to this dilemma, the court confronted the issues arising from the tension between the two statutory systems, but its holding opened a new area of debate related to good faith settlements.

At the heart of the case before the court in *Kotecki* were two seemingly incompatible statutory schemes: the Contribution Act, which supports equitable apportionment and payment of damages in accord to one's fault,[12] and the Workers' Compensation Act, which establishes a guaranteed, fixed, no-fault recovery system as the exclusive remedy from an employer.[13] The *Kotecki* court found that allowing unlimited contribution (i.e. an amount proportionate to the full extent of a party's fault) may force an employer to pay an amount greater than its statutory workers' compensation liability, thus thwarting the "central concept behind

10. 585 N.E.2d 1023 (Ill. 1991) [hereinafter *Kotecki*].

11. *Id.* at 1023.

12. *See* Ruffino v. Hinze, 537 N.E.2d 871, 873 (Ill. App. Ct. 1989).

13. *See Kotecki*, 585 N.E.2d at 1026 (citing Lambertson v. Cincinnati Corp., 257 N.W.2d 679, 684 (Minn. 1977)).

workers' compensation. . . ."[14] Conversely, if contribution is not allowed, a third party (who is inherently not part of the statutory compensation system between the employer and employee) may be forced to bear the burden of a full judgment in excess of its comparative fault.[15]

The *Kotecki* court concluded that the "most equitable balance"[16] between the employer's interests and those of the third party could be achieved by applying the "Minnesota" rule as established in *Lambertson v. Cincinnati Corp.*[17] Under this approach, the defendant/third-party plaintiff may seek contribution from the employer but is limited to the amount of the employer's workers' compensation liability.[18]

The decision in *Kotecki* raises important questions about settlements under the Contribution Act. The Contribution Act, seeking to encourage settlements as a matter of public policy,[19] requires only that a settlement be in good faith in order to discharge a settling tortfeasor from all contribution liability. However, the *Kotecki* rule changes the scope of an employer's potential liability. By dramatically limiting this potential liability, the *Kotecki* rule directly influences the factors[20] traditionally used by Illinois courts in making a good faith determination when approving a settlement under the Contribution Act. Given the change in the scope of employer liability, parties negotiating for a settlement must confront the new legal landscape established by *Kotecki*. These parties must contemplate what an employer must show during settlement to establish "good faith" and whether *Kotecki* has changed what is required for that showing. Of equal importance is the extent to which *Kotecki* affects the practical and strategic considerations involved in settlement. Is the *Kotecki* rule consistent with public policy regarding settlements? To what extent is the new statutory approach in Illinois to joint and several liability under section 2-1117[21] affected by *Kotecki*?

The focus of this Comment is to address the *Kotecki* decision through an analysis of the workers' compensation and contribution systems and to discuss how *Kotecki* affects good faith settlements in Illinois. Part II will examine the historical relationship between the workers'

14. *Id.*

While an employer's workers' compensation liability may only be $50,000, it is possible, as in our hypothetical, that the employer's relative fault could reach $750,000 or more, depending on the jury's determination.

15. *Id.*

16. *Id.* at 1027.

17. 257 N.W.2d 679 (Minn. 1977) [hereinafter *Lambertson*].

18. *Kotecki*, 585 N.E.2d at 1027.

19. *See infra* note 155 and accompanying text.

20. *See infra* notes 158-63 and accompanying text.

21. *See* ILL. REV. STAT. ch. 110, para. 2-1117 (1991).

compensation and contribution doctrines by addressing Illinois case law as well as the different approaches used by other jurisdictions. Both the details of the *Kotecki* decision and how the new rule established by *Kotecki* strikes an appropriate balance between the competing systemic interests involved in both statutory schemes will be discussed in Part III. Finally, Part IV will identify the current Illinois test (or lack of one) for a good faith settlement and will address the important settlement issues implicated by the *Kotecki* decision. This Comment concludes that while *Kotecki*'s limited contribution rule will not directly affect the current standard for establishing a good faith settlement, the change in the scope of employer liability will dramatically impact the likelihood and terms of such settlements in the future.

II. HISTORICAL BACKGROUND

A. Illinois Law

1. The Origin of Workers' Compensation

Workers' compensation statutes[22] in Illinois and throughout the country developed from the substantial hardships and inequities which the common law system placed on both employers and employees.[23] Prior to their enactment, injured employees could sue their employers but encountered often crippling obstacles such as the common law defenses of contributory negligence, the fellow-servant doctrine and assumption of risk.[24] Employers often easily defeated employee actions against them by asserting these common law defenses. Successful litigation by employees proved to be a very difficult, expensive, and, often, elusive achievement under the common law.[25] However, when employees did obtain a verdict, employers were left to the whim of juries, which

22. All fifty states now have workers' compensation statutes in effect. *See* Steven D. Robinson, *Workmen's Compensation: The Third Party Dilemma*, 19 IDAHO L. REV. 259, 260 n.2 (1983) (providing a complete list of workers' compensation statutes).

23. Brad A. Elward, Comment, *The Interplay Between Contribution and Workers' Compensation in Illinois: Putting an End to Backdoor Recoveries*, 13 S. ILL. U. L.J. 103, 108 (1988). Under the common law, there were no fixed standards for determining fair compensation for injured employees; thus, two similarly injured employees could recover different amounts. Furthermore, because these difficulties often led to litigation, the weaker bargaining position and financial resources of employees resulted in many unfavorable verdicts and uncompensated injuries.

Employers were also left at the whim of juries to determine injury compensation. In some cases verdicts could be "extremely excessive, in others totally inadequate, and in every case a matter of absolute speculation. . . ." 1 THOMAS C. ANGERSTEIN, ILLINOIS WORKMENS' COMPENSATION § 3, at 7 (rev. ed. 1952).

24. Curt N. Rodin, *Third-Party Actions: A Plaintiff's Perspective*, 14 LOY. U. CHI. L.J. 443, 444 (1983). *See also* ANGERSTEIN, *supra* note 23, § 14, at 19.

25. Rodin, *supra* note 24, at 444. Injured employees were often left unremedied and deprived of their livelihood. *Id.*

regularly issued both excessively large and inadequately small damage amounts.[26]

The complexity of common law rules surrounding the employer/employee relationship[27] as well as the rise of industrial accidents and litigation led to the establishment of workers' compensation statutes by state legislatures in the early twentieth century.[28] The basic aim of these statutes was to provide a minimum level of compensation to the injured employee without having to resort to litigation against the employer on the issue of negligence.[29] In effect, the statutes provided a substitute for common law actions and established new rights and liabilities of employers and employees relating to work-related injuries.[30]

The structure of these statutes varied greatly, but a number of common features emerged: "1) automatic benefits for an employee injured in the course of his employment; 2) no-fault liability for the employer; 3) employee benefits limited to medical expenses and a portion of lost wages; 4) elimination of the right of any party to bring suit against the employer for the injury; 5) retention of the employee's right to sue a negligent third party; 6) administration by a governmental agency, commission, or bureau; and 7) mandatory employer obtained security for compensation in the form of insurance, contributions to a state fund, or self-insurance."[31]

The enactment of the workers' compensation statutes represented an important *quid pro quo* between employers and employees.[32] Employers relinquished their common law defenses and accepted absolute liability for injuries to employees arising from the course of employment. This guaranteed employees recovery of a specific set amount, usually lower than what a jury might determine as damages, without the burden and risk of having to prove the employer's negligence or the absence of their own negligence.[33] In exchange, employees gave up their right to all common law and statutory actions against their employers, thus immunizing employers from direct suit. A strict statutory compensation procedure

26. ANGERSTEIN, *supra* note 23, § 3, at 7.

27. A complete analysis of these rules is beyond the scope of this Comment. For further treatment, see WILLIAM L. PROSSER, LAW OF TORTS § 80, at 525-30 (4th ed. 1971).

28. *Id.* at 530.

29. Robinson, *supra* note 22, at 260-61.

30. Rodin, *supra* note 24, at 444; *see also* Kelsay v. Motorola, Inc., 384 N.E.2d 353, 356 (Ill. 1978).

31. Eugene J. Geekie, Jr., Comment, *The Exclusive Remedy Controversy: Can Third Party Inequity Be Alleviated Without Disturbing the Principles of Workers' Compensation?*, 29 ST. LOUIS U. L.J. 489, 492-93 (1985) (citing 1 ARTHUR LARSON, WORKMEN'S COMPENSATION § 1.20, at 1 (1964)).

32. Elward, *supra* note 23, at 109.

33. *Id.* at 110.

specified recovery amounts for each type of injury.[34]

A significant aspect of the Workers' Compensation Act ("Act") was that it was intended to be the exclusive remedy for employees against employers.[35] Section 5 of the Act identifies the workers' compensation scheme as the sole means for an employee to seek redress against an employer, precluding action based upon any other kind of tort theory.[36] In using an exclusive remedy provision, the legislature intended to reduce the harshness of the absolute liability placed on employers and to preclude actions against employers from outside of the workers' compensation scheme.[37] The Act prevents employee-plaintiffs from simultaneously seeking common law tort redress and workers' compensation benefits. Thus, it precludes the possibility of double recovery from employers by injured employees seeking to recover both workers' compensation and damages from common law actions.[38]

Despite these exclusive remedy provisions (which relate to employers), the Act does not restrict an injured employee's right to bring an action against some third party to recover full damages.[39] However, an employer retains a statutory lien in such actions against a portion of the recovery by the employee from a third party; this lien is equal to the amount it paid to the employee in workers' compensation benefits.[40] While the lien appears to be a boon to the employer, it serves the purpose of reimbursing the employer for the amount of benefits paid and prevents double recovery by the employee-plaintiff. Yet, the injured employee-plaintiff is still fully compensated for his or her injuries by the third party.

34. *Id.* at 109.

35. *See, e.g.*, ILL. REV. STAT. ch. 48, para. 138.5(a), 138.11 (1991). A full discussion of the policies behind the exclusive remedy provision and how they have eroded is beyond the scope of this Comment. For a thorough analysis, see Comment, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641 (1983).

36. ILL. REV. STAT. ch. 48, para. 138.5(a) (1991).

It is important to note, however, that there are several exceptions to the statutory scheme. These include, e.g., actions based upon intentional conduct and fraud by the employer.

37. Elward, *supra* note 23, at 110. Illinois courts have addressed the exclusive remedy provision on a number of occasions. *See, e.g.*, Robertson v. Travelers Ins. Co., 448 N.E.2d 866, 871 (Ill. 1983).

38. *See, e.g.*, Fregeau v. Gillespie, 451 N.E.2d 870, 873 (Ill. 1983) (the court identified the legislature's intent to avoid the risk of double recovery through the enactment of the compensation system).

39. *See* Geekie, *supra* note 31, at 493.

40. 2A ARTHUR LARSON, THE LAW OF WORKMENS COMPENSATION § 71.00, at 14-1 (1989). Double recovery by the employee is prevented under these provisions. *See, e.g.*, ILL. REV. STAT. ch. 48, para. 138.5(b) (1991).

2. The Origin of Contribution

An injured employee's recovery is not limited to workers' compensation benefits. An employee can claim negligence or strict liability against a responsible third party, seeking to recover damages from the manufacturer or seller of the product which injured him or her in the work environment.[41] If such an action is filed, then the original defendant will often seek to offset its damages payments through a separate action against another responsible party. In the typical case, the manufacturer would seek contribution or indemnity from the employer through a third-party action.[42] Such an action could result in the employer making significant payments to the original defendant.

An important distinction must be drawn between the concepts of contribution and indemnity. Contribution is a type of recovery based in tort[43] with equitable origins. Indemnity, on the other hand, is a type of recovery based on a separate contractual duty or obligation from the employer to the defendant/third-party plaintiff.[44] Generally, in contribution, "a tort-feasor against whom a judgment is rendered is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff."[45] Thus, it allows for an equitable apportionment among joint tortfeasors of the liability to the plaintiff.[46] Indemnity, on the other hand, is

> [a] collateral contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person. [The t]erm pertains to liability for loss shifted from one person held legally responsible to another person.[47]

41. *See, e.g.*, Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978).

42. *See* ILL. REV. STAT. ch. 110, para. 2-406 (1991), which reads in pertinent part:

> (b) Within the time for filing his or her answer or thereafter by leave of court, a defendant may be third-party complaint bring in as a defendant a person not a party to the action who is or may be liable to him or her for all or part of the plaintiff's claim against him or her.

43. Larson, *supra* note 5, at 353. The Illinois Supreme Court has identified this distinction on a number of occasions. *See, e.g.*, Allison v. Shell Oil Co., 495 N.E.2d 496, 497-99 (Ill. 1986) (holding that, following the adoption of comparative negligence and contribution principles in Illinois, the active/passive indemnity doctrine is no longer viable); *Skinner*, 374 N.E.2d at 439 (establishing contribution as a cause of action).

44. Larson, *supra* note 5, at 353.

45. BLACK'S LAW DICTIONARY 174 (abridged 5th ed. 1983).

46. Nina S. Appel & Richard A. Michael, *Contribution Among Joint Tortfeasors in Illinois: An Opportunity for Legislative and Judicial Cooperation*, 10 LOY. U. CHI. L.J. 169, 170-71 (1979).

47. BLACK'S LAW DICTIONARY 393 (abridged 5th ed. 1983).

Indemnity refers to a type of "all or nothing" theory by which the liable party is able to recoup the full amount of his or her liability from another.[48] Thus, the distinction is centered on the amount of damages to be paid and the legal device compelling payment: contribution distributes proportionate liability among the tortfeasors and indemnity shifts the entire judgment from one tortfeasor onto another.[49]

Originally, the common law denied contribution among joint tortfeasors in *Merryweather v. Nixan*.[50] The rationale most commonly asserted for this prohibition was that the law would not distinguish between the acts of wrongdoers.[51] While American courts originally prohibited contribution only in cases of willful misconduct, the no-contribution rule was gradually extended to cases involving negligence or mistake.[52]

Despite this rationale, the no-contribution rule resulted in harsh consequences for the parties involved. Although one tortfeasor may have been considerably more responsible for a plaintiff's injuries than another, the plaintiff may not have sued him or her for reason of sheer chance or whim. Because the doctrine of joint and several liability allowed the plaintiff to recover fully against any responsible party, the sole tortfeasor who was sued had to carry the full burden of the judgment, despite being a relatively blameless party.[53]

48. Appel & Michael, *supra* note 46, at 170. Indemnity is a concept which continues to have vitality in Illinois. *See, e.g.*, Frazer v. A.F. Munsterman, Inc., 527 N.E.2d 1248 (Ill. 1988). The right to indemnification may arise from a contractual relationship (*see* Westinghouse Electric Elevator Co. v. LaSalle Monroe Bldg. Corp., 70 N.E.2d 604 (Ill. 1947)) or "from situations in which a promise to indemnify can be implied from the relationship among the tortfeasors." *Frazer*, 527 N.E.2d at 1251. Indemnity doctrine is a complex area of the law of which the scope of this Comment does not allow full treatment.

49. *See* Suvada v. White Motor Co., 210 N.E.2d 182, 188 (Ill. 1968) (quoting WILLIAM L. PROSSER, LAW OF TORTS § 48, at 278 (3d ed. 1964)):

> There is an important distinction between contribution, which distributes the loss among the tortfeasors by requiring each to pay his proportionate share, and indemnity, which shifts the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead.

50. 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799). *See* Theodore W. Reath, *Contribution Between Persons Jointly Charged for Negligence* - Merryweather v. Nixan, 12 HARV. L. REV. 176 (1898). For a thorough bibliography of the extensive scholarly work on contribution (through 1983), see Peter B. Kutner, *Bibliography: Contribution Among Tortfeasors*, 3 REV. LITIG. 297 (1983).

51. *See, e.g.*, Johnson v. Chicago & Pacific Elevator Co., 105 Ill. 462, 468 (1882) ("there is no right of contribution between wrong-doers").

52. PROSSER, *supra* note 27, § 50, at 306; *see also* Consolidated Ice Mach. Co. v. Keifer, 25 N.E. 799, 802 (Ill. 1890).

53. PROSSER, *supra* note 27, § 50, at 307. Prof. Prosser has noted:

> There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.

In Illinois, the courts sought to avoid the severity of the no-contribution rule at common law by expanding the right to indemnification from other parties.[54] While the original basis for indemnity was an express contract, this concept was expanded to include a right to indemnification inferred from a contractual or special relationship existing between the parties.[55] Implied indemnity, based on the active-passive negligence[56] of the potentially responsible parties, was used to "mitigate the harsh effects that could result from an inflexible application of this judicially created bar to contribution."[57] However, because this concept's application was not precise and the active-passive negligence doctrine did not yield consistent results, the courts and the parties were unsatisfied.[58]

Despite its harsh effect, the no-contribution rule was still utilized until the Illinois Supreme Court, in *Skinner v. Reed-Prentice Div. Package Mach. Co.*,[59] established contribution as an independent cause of action in Illinois. The court, upon reviewing the history of contribution and indemnity, found that the no-contribution rule yielded unjust results.[60] Furthermore, it found that the active-passive indemnity doctrine presented opportunities for "fraud and collusion among the parties"[61] because the rule required the court to search for qualitative distinctions in the negligence of the two parties.

Notably, the *Skinner* court held that an employer's immunity from direct suit by an employee under the Workers' Compensation Act did not preclude a third-party action by the manufacturer for contribution from the employer.[62] Thus, there was no longer a valid reason for the

Id.

54. Randall F. Clark, *Comparative Contribution: The Legislative Enactment of the Skinner Doctrine*, 14 J. MARSHALL L. REV. 173, 174 (1980).

55. Geekie, *supra* note 31, at 496.

56. The active-passive test was that "a tortfeasor may seek to impose indemnity upon another wrongdoer if there exists a 'qualitative distinction between the negligence of the two tortfeasors.' " Harris v. Algonquin Ready Mix, Inc., 322 N.E.2d 58, 60 (Ill. 1974) (quoting Chicago & Ill. Midland Ry. Co. v. Evans Constr. Co., 208 N.E.2d 573, 574 (Ill. 1965)).

57. Muhlbauer v. Kruzel, 234 N.E.2d 790, 792 (Ill. 1968).

58. Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437, 441 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978); *see also* Carver v. Grossman, 305 N.E.2d 161, 163 (Ill. 1973).

59. 374 N.E.2d 437 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978). The case involved a strict liability action against Reed-Prentice Div. Package Mach. Co. (Reed) for injuries sustained by the employee-plaintiff in an accident involving an injection molding machine manufactured by Reed. Reed filed a third-party complaint against plaintiff's employer, seeking contribution in an amount "commensurate with the degree of misconduct attributable to the third party defendant in causing plaintiff's injuries." *Id.* at 438. The court reversed the dismissal of the third-party complaint and held that the complaint stated a valid cause of action. *Id.* at 443.

60. *Id.* at 442.

61. *Id.*

62. *Id.* at 443. However, Justice Dooley questioned the majority's short conclusion on this

no-contribution rule.

The *Skinner* court established a contribution action in which the liability for the plaintiff's injuries was to be apportioned, according to equitable principles, "on the basis of the relative degree to which the defective product and the employer's conduct proximately caused them."[63] By requiring apportionment of liability based upon the relative fault of the parties, the court introduced principles of comparative fault to Illinois for the first time.[64] However, the court limited contribution actions to cases where "the employer's misuse of the product [causing the plaintiff's injuries] or assumption of the risk of its use contributed to cause plaintiff's injuries . . . ."[65]

In 1979, the Illinois General Assembly enacted the Contribution Among Joint Tortfeasors Act.[66] The statute permits an action for contribution against a third party by a tortfeasor "who has paid more than his pro rata share of the common liability."[67] However, Section 302(a) requires that the parties must be "subject to *liability in tort* arising out of the same injury."[68] This language would later become the key issue in determining whether employers (who are arguably not liable in tort because of the Workers' Compensation Act) can be sued for contribution.[69] The *Skinner* decision did not place such a requirement on the right to contribution. Nevertheless, subsequent court decisions have held that

issue. He argued that the Workers' Compensation Act prevents an employer from sharing a common liability with the manufacturer to the employee since the employee cannot sue the employer directly. *Id.* at 450.

While many commentators take exception to the majority's ruling on this issue, Prof. Larson led the field in criticizing *Skinner* by stating:

> Perhaps the most serious single blind spot in this otherwise understandable attempt to find an equitable compromise is the almost complete failure to give any weight to the component of exclusiveness of the compensation remedy. Here we have a field of law that is entirely statutory in origin, with an intricate legislative balancing of interests of employer, employee, and third party, one keystone of which is the exclusiveness principle. It is no light matter for a court, after 65 years, to take it on itself to alter drastically that balance of interests at the expense of one party to the system, however appealing to the court the final result might be.

LARSON, *supra* note 1, § 76.39, at 14-728.

63. *Id.* at 442. Justice Dooley's dissent was particularly vituperative. He questioned the court's understanding of strict liability law by its use of fault principles for apportioning the damages. *Id.* at 446-48. He asked whether the court was in effect adopting comparative negligence. His dissent concluded with a series of questions which he felt were unresolved by the majority's opinion. *Id.* at 454.

64. While *Skinner* utilized principles of comparative fault, Illinois did not use a comparative negligence system of apportioning fault among responsible parties until the landmark case of Alvis v. Ribar, 421 N.E.2d 886 (Ill. 1981).

65. *Skinner*, 374 N.E.2d at 443.

66. ILL. REV. STAT. ch. 70, para. 301-05 (1991).

67. *Id.* ch. 70, para. 302(b).

68. *Id.* ch. 70, para. 302(a) (emphasis added).

69. *See* Doyle v. Rhodes, 461 N.E.2d 382 (Ill. 1984).

this statute was intended to codify *Skinner* and "not to diminish its scope."[70] In effect, these decisions illustrate that a broad right to contribution was created in *Skinner* and that it was not intended to be modified or limited by additional language within the Contribution Act.

Outside of Illinois, the language "liability in tort," as it appears in most contribution statutes, is widely held[71] to place a requirement of common liability in tort by the tortfeasors to the employee.[72] Under traditional workers' compensation theory, the immunity granted to employers from direct suit by employees prevents employers from any liability in tort. Thus, since there cannot be common liability in tort to an employee by an employer and another party, contribution cannot be sought from employers. Ironically, one respected commentator stated that the language of the Contribution Act does not even permit contribution on the *Skinner* facts which involve a third-party action for contribution by a manufacturer against an employer.[73]

Ambiguities regarding the meaning of "liability in tort" were addressed by the Illinois Supreme Court in *Doyle v. Rhodes*.[74] In considering whether an employer could be liable for contribution to a manufacturer in light of the employer's immunity under the Workers' Compensation Act from direct suit by an employee, the court confronted the grey area where the Workers' Compensation Act and the Contribution Act meet.[75] The court held that legislative history confirmed the Contribution Act codified the *Skinner* decision and did not modify it.[76] Thus, under *Doyle*, the Contribution Act did not change the vitality of the *Skinner* holding that employers could be liable for contribution.

The *Doyle* court also addressed the Contribution Act's requirement

70. Doyle v. Rhodes, 461 N.E.2d 382, 385 (Ill. 1984); *see also* Coney v. J.L.G. Indus., Inc., 454 N.E.2d 197, 206 (Ill. 1983); Stephens v. McBride, 455 N.E.2d 54, 58 (Ill. 1983). *But see* J.I. Case Co. v. McCartin-McAufiffe Plumbing & Heating, Inc., 516 N.E.2d 260 (Ill. 1987) (holding that the language of the Act provides a slightly different basis for contribution than that in *Skinner* by not requiring misuse or assumption of risk by employer).

71. For a list of jurisdictions maintaining the no-contribution against employers rule, see note 84 and accompanying text; *see also* UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 57 (1975).

72. Larson, *supra* note 5, at 353-54.

73. LARSON, *supra* note 1, § 76.39, at 14-728 (*Skinner* involved a contribution action against an employer); *see also* Lake Motor Freight, Inc. v. Randy Trucking, Inc., 455 N.E.2d 222, 224 (Ill. App. Ct. 1983) (holding that an employer is not subject to liability in tort for employees' injuries and thus not liable for contribution).

74. 461 N.E.2d 382 (Ill. 1984).

75. *Id.* at 383-84.

76. *Id.* at 386. The court reviewed several of its previous interpretations of *Skinner* and the Act. (*See* note 66-70 and accompanying text). It also analyzed the legislative history and found that it supported the conclusion that *Skinner* had simply been codified by the Act.

that both defendants be "subject to liability in tort."[77] The employer argued that this language precluded a right of contribution against it, given its liability to the plaintiff on a "no-fault basis" and a special immunity from tort liability.[78] The court, however, held employers may use the Workers' Compensation Act as an affirmative defense against any tort liability.[79] From this perspective, the court found that employers are "subject to liability in tort" and may be required to pay damages to plaintiffs unless they assert this defense.[80] Thus, in Illinois, contribution actions against employers were sanctioned by the Contribution Act and not prohibited by the Workers' Compensation Act.

The court did note, however, that the right of contribution may impact an employer's right of recoupment as established by the Workers' Compensation Act.[81] This right of recoupment (or lien) refers to the amount of workers' compensation paid to the injured employee which the employer may recoup "from the proceeds of any award, judgment or settlement fund out of which the employee might be compensated for his injury by a third party . . . who has caused the employee's injuries."[82] But because the parties failed to address this issue, the *Doyle* court was not prepared to take a position on it; it did, however, "caution that some accommodation between these two statutes may be in order."[83] This dictum illustrated *Doyle* was not determinative of all the issues affected by the interplay between the Workers' Compensation Act and the Contribution Act and provided the basis for the decision in *Kotecki*.

B. Other Jurisdictions

1. Majority Rule Against Contribution

The large majority of states apply a no-contribution rule to third-

77. *Id.* at 386-87.

78. *Id.* at 386.

79. *Id.* The court found that:

> The Workers' Compensation Act provides employers with a defense against any action that may be asserted against them in tort, but that defense is an affirmative one whose elements—the employment relationship and the nexus between the employment and the injury—must be established by the employer, and which is waived if not asserted by him in the trial court.

Id.

80. *Id.* at 386. This interpretation of the Workers' Compensation Act has been widely questioned and even criticized. The dissent, Chief Justice Ryan, states that the very language of the Workers' Compensation Act precludes the possibility of this result. In the dissent's view, "[u]nder section 5(a) of the Workmen's Compensation Act, where there is no question that the plaintiff was injured in the line of his duty as an employee, the employer is not 'subject to liability in tort.' " *Id.* at 392. *See also* LARSON, *supra* note 1, § 76.39, at 14-728-29.

81. *Doyle*, 461 N.E.2d at 388-89 (referring to ILL. REV. STAT. ch. 48, para. 138.5(b) (1991)).

82. *Id.* at 388-89.

83. *Id.* at 389.

party actions by a tortfeasor against a negligent employer.[84] Thus, even if a jury finds that both the manufacturer's and the employer's actions combined to proximately cause a plaintiff's injuries, the manufacturer must bear the full damage burden with no relief through contribution. With no ability to resort to a contribution action, a partially liable defendant-manufacturer is forced under this rule to pay beyond its relative fault.

Professor Larson has succinctly stated the basis for the no-contribution rule:

> The rationale is a simple one: the employer is not jointly *liable* to the employee in tort; therefore he cannot be a joint tortfeasor. The liability

84. Forty-five states use this rule. *Alabama*: Redwing Carriers, Inc. v. Crown Central Petroleum Corp., 356 So. 2d 1203 (Ala. 1978); *Alaska*: State v. Wien Air Alaska, Inc., 619 P.2d 719 (Alaska 1980); Golden Valley Elec. Co. v. City Elec. Serv., Inc., 518 P.2d 65 (Alaska 1974); *Arizona*: Desert Steel Co. v. Superior Court, 526 P.2d 1077 (Ariz. 1974); *Arkansas*: W.M. Bashlin Co. v. Smith, 643 S.W.2d 526 (Ark. 1982); *California*: Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd., 587 P.2d 684 (Cal. 1978); E.B. Wills Co, Inc. v. Superior Court, 128 Cal. Rptr. 541 (Ct. App. 1976); *Colorado*: Williams v. White Mountain Constr. Co., Inc., 749 P.2d 423 (Colo. 1988); Public Serv. Co. of Colo. v. District Court, 638 P.2d 772 (Colo. 1981); *Connecticut*: A.A. Equip., Inc. v. Farmoil, Inc., 330 A.2d 99 (Conn. Super. Ct. 1974); *Delaware*: Powell v. Interstate Vendaway, Inc., 300 A.2d 241 (Del. 1972); Farral v. Armstrong Cork Co., 457 A.2d 763 (Del. Super. Ct. 1983); *Florida*: Houdaille Indus. v. Edwards, 374 So. 2d 490 (Fla. 1979); *Georgia*: Sargent Indus., Inc. v. Delta Airlines, Inc., 303 S.E.2d 108 (Ga. 1983); *Hawaii*: Hanagami v. China Airlines, Ltd., 688 P.2d 1139 (Haw. 1984); *Indiana*: Elcona Homes Corp. v. McMillian Bloedell, Ltd., 475 N.E.2d 713 (Ind. App. 1985); *Iowa*: Mermigis v. Servicemaster Indus., Inc., 437 N.W.2d 242 (Iowa 1989); *Kansas*: Houk v. Arrow Drilling Co., 439 P.2d 146 (Kan. 1968); *Louisiana*: Casnave v. Dixie Bldg Material Co., 490 So. 2d 381 (La. App. 1986); Gros v. Steen Prod. Serv., Inc., 197 So. 2d 356 (La. App. 1967); *Maine*: Diamond Int'l Corp. v. Sullivan & Merritt, Inc., 493 A.2d 1043 (Me. 1985); *Maryland*: Baltimore Transit Co. v. State, 39 A.2d 858 (Md. 1944); *Massachusetts*: Larkin v. Ralph O. Porter, Inc. 539 N.E.2d 529 (Mass. 1989); Liberty Mutual Ins. Co. v. Westerland, 373 N.E.2d 957 (Mass. 1978); *Michigan*: Husted v. Consumers Power Co., 135 N.W.2d 370 (Mich. 1965); *Missouri*: State *ex rel.* Hillyard Chem. Co. v. Schoenlaub, 610 S.W.2d 957 (Mo. 1981); *Montana*: Webb v. Montana Masonry Constr. Co., 761 P.2d 343 (Mont. 1988); *Nebraska*: Union Pacific R.R. Co. v. Kaiser Agric. Chem. Co., 425 N.W.2d 872 (Neb. 1988); Vangreen v. Interstate Mach. & Supply Co., 246 N.W.2d 652 (Neb. 1976); *New Hampshire*: William H. Field Co. v. Nuroco Woodwork, Inc., 348 A.2d 716 (N.H. 1975); *New Jersey*: Schweizer v. Elox Div. of Colt Indus., 359 A.2d 857 (N.J. 1976); *New Mexico*: Beal v. Southern Union Gas Co., 304 P.2d 566 (N.M. 1956); *North Carolina*: Leonard v. John-Mansville Sales Corp., 305 S.E.2d 528 (N.C. 1983); Hunsucker v. High Point Bending & Chair Co., 75 S.E.2d 768 (N.C. 1953); *North Dakota*: Gernard v. Ost Serv., Inc., 298 N.W.2d 500 (N.D. 1980); *Ohio*: Taylor v. Academy Iron & Metal Co., 522 N.E.2d 464 (Ohio 1988); Bankers Indem. Ins. Co. v. Cleveland Hardware & Forging Co., 62 N.E.2d 180 (Ohio 1945); *Oklahoma*: Harter Concrete Prod., Inc. v. Harris, 592 P.2d 526 (Okla. 1979); *Pennsylvania*: Tsarnas v. Jones & Laughlin Steel Corp., 412 A.2d 1094 (Pa. 1980); *Rhode Island*: Iorio v. Chin, 446 A.2d 1021 (R.I. 1982); *South Carolina*: Adcox v. American Home Assurance Co., 188 S.E.2d 785 (S.C. 1972); *South Dakota*: Kessler v. Bowie Mach. Works, 501 F.2d 617 (8th Cir. 1974) (applying South Dakota law); *Tennessee*: Rupe v. Durbin Durco, Inc. 557 S.W.2d 742 (Tenn. Ct. App. 1976); *Texas*: Varela v. American Petrofina Co., 658 S.W.2d 561 (Tex. 1983); *Utah*: Phillips v. Union Pac. R.R. v. Hammary Furniture Co., 614 P.2d 153 (Utah 1980); *Vermont*: Hiltz v. John Deere Indus. Equip. Co., 497 A.2d 748 (Vt. 1985); *Virginia*: Virginia Elec. Power Co. v. Wilson, 277 S.E.2d 149 (Va. 1981); *Washington*: Glass v. Stahl Specialty Co., 652 P.2d 948 (Wash. 1982); *West Virginia*: Belcher v. J.H. Fletcher & Co., 498 F. Supp. 629 (S.D. W. Va. 1980) (applying West Virginia law); *Wisconsin*: Jenkins v. Sabourin, 311 N.W.2d 600 (Wis. 1981); *Wyoming*: Mauch v. Stanley Structures, Inc. 641 P.2d 1247 (Wyo. 1982).

> that rests upon the employer is an absolute liability irrespective of negligence, and this is the only kind of liability that can devolve upon him whether he is negligent or not. The claim of the employee against the employer is solely for statutory benefits; his claim against the third person is for damages. The two are different in kind and cannot result in a common liability.[85]

By focusing on the question of common liability as to the injured employee, this approach emphasizes that an employer's liability under the workers' compensation system is its sole liability arising out of an employee's injury. The employer's negligence is not a factor for its workers' compensation liability.[86]

Courts often suggest that the rationale for the no-contribution rule is based on the exclusive remedy provisions of the workers' compensation statutes. As discussed *supra*,[87] these provisions identify the workers' compensation system as establishing the extent of an employer's liability for an employee's injury. These jurisdictions hold that these statutes preclude the possibility of contribution liability to third parties.[88] Principles of comparative negligence and equitable allocation of fault and liability are essentially irrelevant since the third party must necessarily absorb the negligent employer's fault.[89]

2. Minority Rule Allowing Unlimited Contribution

In 1972 New York adopted a rule based on unlimited contribution in *Dole v. Dow Chemical Co.*[90] The Court of Appeals held that, in a products liability case, the original defendant/third-party plaintiff (Dow Chemical) could implead the employer and seek recovery in an amount proportionate to the employer's fault without any artificial cap.[91] The potential for conflict with the workers' compensation statute was dismissed by the court which declared that liability as to the third-party plaintiff by the employer was separate from liability as to the original

85. Larson, *supra* note 5, at 354-55 (emphasis added).

86. David Dunlavey, Note, *The Third Party's Right To Contribution from an Employer Covered by Workmen's Compensation*, 56 N.D. L. REV. 373, 380 (1980).

87. *See supra* notes 35-40 and accompanying text.

88. Dunlavey, *supra* note 86, at 380-81. *See, e.g.*, Santisteven v. Dow Chem. Co., 362 F. Supp. 646 (D. Nev. 1973), *aff'd*, 506 F.2d 1216 (9th Cir. 1974); Jordan v. Solventol Chem. Prod., Inc., 253 N.W.2d 676 (Mich. Ct. App. 1977).

89. Dunlavey, *supra* note 86, at 381; *see also* Prosser, *supra* note 27, at 433.

90. 282 N.E.2d 288 (N.Y. 1972). Subsequent New York decisions have utilized the rule established in *Dole; see, e.g.*, Sabre v. Rutland Plywood Corp., 490 N.Y.S.2d 354 (App. Div. 1985) (upholding a verdict finding an employer 99% negligent in an action by the seller); Smith v. Hooker Chem. & Plastics Corp., 455 N.Y.S.2d 446 (App. Div. 1982) (reversing summary judgment for third-party plaintiff against employer on the grounds that the indemnity cause of action did not accrue until employee's suit against employer was first resolved).

91. *Dole*, 282 N.E.2d at 292.

plaintiff-employee.[92] Since an independent duty owed to the third-party plaintiff was alleged,[93] there was no conflict based on the lack of any common liability, despite the fact that liability arose out of the plaintiff-employee's injuries.

The *Dole* court considered the action to be about partial/implied indemnity[94] and did not characterize it as a contribution action. However, upon reviewing the concept of active/passive negligence,[95] the court found the test difficult to apply fairly and that apportionment of fault in negligence between responsible parties was the better reasoned approach. The court's analysis effectively blurred the distinction between implied indemnity and contribution in using a damage apportionment approach based on the parties' relative fault.[96] The theoretical distinctions between indemnity (based on contractual duties) and contribution (based on duty in tort) were abandoned by the court.[97] No other states have adopted this approach.

3. Minority Rule Favoring Limited Contribution

The Pennsylvania or Minnesota rule reflects a second minority approach. First adopted by Pennsylvania in *Maio v. Fahs*,[98] this rule allows third-party actions to be brought against negligent employers, but a limit is placed on the amount that can be required in contribution from the employer. This cap is set at the amount payable under the workers' compensation statute. Thus, the defendant/third-party plaintiff can only recover from the employer an amount equal to the sum paid to the injured employee by the employer under its statutory compensation liability.[99] Though no longer used in Pennsylvania,[100] the rule survives in Minne-

92. *Id.* at 294-95.

93. *Id.* at 294.

94. *Id.* at 293.

95. *Id.* at 291-92 (The concept "allows full indemnity in favor of one found to be passively negligent against another found to be actively negligent who could be brought into the action by the passively negligent party and required to answer the claim over.").

96. Geekie, *supra* note 31, at 502.

For a complete analysis of the relationship between the *Dole* rule and the workers' compensation statute, see Clifford Davis, *Third-Party Tortfeasors' Rights Where Compensation-Covered Employers Are Negligent - Where Do Dole and Sunspan Lead?*, 4 HOFSTRA L. REV. 571 (1976).

97. LARSON, *supra* note 1, § 76.38, at 14-725-26.

98. 14 A.2d 105 (Pa. 1940).

99. *Id.* at 111. Achieving this result has been described as a "tour de force" by Prof. Larson. He notes, however, that to arrive at this end, two hurdles must be crossed. First, the statutory language "liable in tort" must be held to mean guilty of contributing to a tort, rather than liable for the tort. Second, in placing the limit on the contribution amount at the extent of compensation liability, the cap must be arbitrarily imposed for policy reasons. LARSON, *supra* note 1, § 76.34, at 14-709.

100. The Pennsylvania legislature abolished it by enacting an amendment to its workers' compensation statute prohibiting all contribution against employers. 77 PA. CONS. STAT. § 481(b)

sota,[101] Kentucky,[102] and now Illinois.[103]

4. Alternate Approach

Finally, a different rule is found in California,[104] Idaho,[105] and North Carolina.[106] This rule places an employer's maximum exposure as the amount of its workers' compensation payments, similarly to the Pennsylvania/Minnesota rule, but a different method is used not involving contribution at all. When an employer's negligence contributes to an employee's injury, the employee's recovery from a third party is simply reduced by the amount of workers' compensation paid by the employer.[107] Thus, no contribution action against the employer is allowed; the original defendant's damage payments to the employee are reduced initially. In addition, the employer's lien over payments made to the plaintiff by the original defendant is eliminated. In the end, all the parties pay out the same amounts as under the Pennsylvania/Minnesota rule but through a simpler process.

III. *KOTECKI V. CYCLOPS WELDING CORP.*

A. Facts of the Case

Mark A. Kotecki was employed by Carus Chemical Co. ("Carus") when he was injured on the job by an agitator manufactured by Cyclops Welding Corp. ("Cyclops"). He subsequently brought an action in La Salle County, Illinois against Cyclops. Kotecki alleged negligent design, construction and installation of the agitator without adequate guarding

(1974) (an employer is only liable to a third party when "expressly . . . provided for in a written contract"); *see also* Tsarnas v. Jones & Laughlin Steel Corp., 412 A.2d 1094, 1096 (Pa. 1980) ("Nor may the third party otherwise seek contribution or indemnity from the employer, even though the employer's own negligence may have been the primary cause of the injury.").

101. *See* Lambertson v. Cincinnati Corp., 257 N.W.2d 679 (Minn. 1977).

102. KY. REV. STAT. ANN. § 342.690(1) (Baldwin 1991) (an employer may be liable "to another person who . . . has paid damages on account of injury or death of an employee of such employer arising out of and in the course of employment and caused by a breach of any duty or obligation owed by such employer to such other . . . limited to the amount of compensation and other benefits for which such employer is liable under this chapter."); Burrell v. Electric Plant Bd. of Franklin, Ky., 676 S.W.2d 231, 233 (Ky. 1984) (holding 1973 Workers' Comp. Amendment extended right to contribution against employers limited to the amount of workers' comp. benefits), *overruled on other grounds*, Dix & Assoc. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 29 (Ky. 1990).

103. Kotecki v. Cyclops Welding Corp., 585 N.E.2d 1023, 1028 (Ill. 1991).

104. Tate v. Superior Court, 28 Cal. Rptr. 548 (Ct. App. 1963).

105. IDAHO CODE § 72-209(2) (1991); Runcorn v. Shearer Lumber Prod., Inc., 690 P.2d 324, 331 (Idaho 1984) ("The third party is then allowed a reduction in damages by the percentage of liability attributed to the employer not to exceed the amount of workmen's compensation benefits paid, and the insurer's right to reimbursement by that same amount is forfeited.").

106. Hunsucker v. High Point Bending & Chair Co., 75 S.E.2d 768 (N.C. 1953).

107. LARSON, *supra* note 1, § 76.36, at 14-713-15.

devices.[108]

Soon after the original complaint was filed, Cyclops brought a third-party action against Carus alleging negligence and seeking contribution pursuant to the Illinois Contribution Act.[109] Cyclops sought unlimited or full contribution, that is to say, "such amount as necessary to adjust the parties to their respective degrees of culpability" should Cyclops be found liable to Kotecki at trial.[110]

Carus filed a motion to strike the *ad damnum* clause[111] in the third-party complaint, basing its argument on an interpretation of the interplay between Workers' Compensation Act[112] with the Contribution Act. Carus asserted that these acts, when read in conjunction, placed a limit on an employer's contribution liability which was not to exceed the employer's workers' compensation exposure. In effect, Carus recognized that a right to contribution existed, but it read the acts as limiting the amount for which an employer was liable to the amount of its workers' compensation payments. The trial court denied the motion.[113]

Carus' interlocutory petition to appeal to the Appellate Court was denied.[114] Carus subsequently petitioned successfully for leave to appeal to the Illinois Supreme Court. The trial court's certified question for review was framed as follows:

> Whether an employer sued as a third-party defendant in a products liability case is liable in contribution for any amount in excess of the employer's statutory liability under the Workers' Compensation Act.[115]

B. The Court's Reasoning

The Illinois Supreme Court reversed the trial court's denial of Carus' motion to strike the *ad damnum* clause of Cyclops' third-party complaint; it held that Cyclops was entitled to seek contribution "in an amount not greater than the workers' compensation liability of the third-party defendant, Carus."[116]

108. *Kotecki*, 585 N.E.2d at 1023.
109. ILL. REV. STAT. ch. 70, para. 301 (1991).
110. Third Party Complaint, paragraph 9.
111. Such clauses "inform an adversary of the maximum amount of the claim asserted without being proof of injury or of liability." BLACK'S LAW DICTIONARY 17 (abridged 5th ed. 1983). Here the *ad damnum* clause prayed for judgment against Carus "in an amount commensurate with the degree of fault attributable to the respective parties." Carus' Petition for Leave to Appeal, at 4.
112. ILL. REV. STAT. ch. 48, para. 138.5 (1989).
113. *Kotecki*, 585 N.E.2d at 1024.
114. *Id.*
115. *Id.*
116. *Id.* at 1028.

The court began by reaffirming that a right of contribution in Illinois from a potentially responsible employer had been established by the *Skinner* court and that the Contribution Act[117] subsequently codified that right of contribution.[118]

Next, the *Kotecki* court held that *Doyle v. Rhodes*[119] stands for the proposition that the Workers' Compensation Act does not bar a contribution claim by original defendants against employers, even when employers have paid benefits to injured employees.[120] However, the court noted that the *Doyle* court did not decide all issues concerning the relationship between the Contribution Act and the Workers' Compensation Act. *Doyle* only stands for the fact that an employer can be liable for contribution, but does not discuss or address the amount of that liability.[121] The court took note of the *Doyle* court's caution that it was not addressing how the recoupment provision of the Workers' Compensation Act[122] may affect the amount of contribution payable under the Contribution Act.[123] Thus, the court confirmed that, under *Doyle*, an employer can be liable for contribution but that it had never decided "the question as to the *amount* of contribution that an employer may be liable for under the Contribution Act."[124]

The court looked to *Lambertson v. Cincinnati Corp.*[125] for a concise statement of the underlying controversy between workers' compensation and contribution. The *Lambertson* court reasoned that if contribution were allowed, an employer may be forced to pay in excess of its statutory compensation liability, "thwart[ing] the central concept behind workers' compensation."[126] If contribution were not allowed, a third-party (who

117. ILL. REV. STAT. ch. 70, para. 302(a) (1991).
118. *Kotecki*, 585 N.E.2d at 1025.
119. 461 N.E.2d 382 (Ill. 1984).
120. *Kotecki*, 585 N.E.2d at 1024.
121. *Id.* at 1025.
122. ILL. REV. STAT. ch. 48, para 138.5(b) (1991).
123. *Kotecki*, 585 N.E.2d at 1025.
124. *Id.*

Cyclops argued that placing any limitation on the amount of contribution would require a "change" in existing law which it argued already allowed for unlimited contribution. Brief for Cyclops at 9-14. The court responded to this argument by distinguishing the pre-*Skinner* indemnity cases relied on by Cyclops for its assertion that unlimited contribution was the rule in Illinois. Cyclops cited Miller v. DeWitt, 226 N.E.2d 630 (Ill. 1967), John Griffiths & Son Co. v. National Fireproofing Co., 141 N.E. 739 (Ill. 1923), and Moroni v. Intrusion-Prepakt, Inc., 165 N.E.2d 346 (Ill. App. Ct. 1960). The court found these cases to be irrelevant to the issue of the potential amount of contribution payable by Carus because indemnity and contribution are mutually exclusive remedies. *Kotecki*, 585 N.E.2d at 1025-26.

For a discussion of the distinction between contribution and indemnity, see *supra* notes 43-49 and accompanying text.

125. 257 N.W.2d 679 (Minn. 1977).
126. *Kotecki*, 585 N.E.2d at 1026 (quoting *Lambertson*, 257 N.W.2d at 684). This central con-

does not pay into the workers' compensation system) would be forced to bear the full damage burden even where its fault was less than the employer's. Furthermore, because an employer may recoup its paid benefits from the plaintiff's recovery through its statutory lien, the third party would effectively subsidize the worker's compensation system beyond its own fault.[127] Because employers are clearly liable for contribution in Illinois,[128] the court decided that "the issue is whether the employer will be forced to pay too much, thereby losing the protection that the Workers' Compensation Act is supposed to provide."[129]

After reviewing the approaches taken by the majority of other jurisdictions (no-contribution rule), New York (unlimited contribution) and Minnesota (limited contribution), the court formally adopted the Minnesota rule, which limits an employer's potential contribution liability to the amount of its workers' compensation exposure.[130] It found the rule strikes an appropriate balance between the employer's interests, as a participant in the workers' compensation system, and the third-party defendant's equitable interests in not paying more than its established fault.[131]

C. *Analysis of the Merits of the* Kotecki *Rule*

The decision in *Kotecki v. Cyclops Welding Corp.* represents an admirable judicial attempt to reconcile conflicting statutory schemes but one which ultimately leaves the interests supporting both statutes only partially fulfilled. The *Kotecki* court[132] and other notable authorities[133] have acknowledged that the interests underlying the Contribution Act (in equitable distribution of liability according to fault) and the Workers' Compensation Act (in a no-fault, fixed amount recovery system establishing exclusive employer liability) are in conflict. Yet, the Illinois legislature has not clearly expressed an intent for either of these statutory schemes to be accorded greater weight than the other.[134] The contro-

cept underlying workers' compensation is "that the employer and employee receive the benefits of a guaranteed, fixed-schedule, nonfault recovery system, which then constitutes the exclusive liability of the employer to his employee." *Id.*

127. *Id.*

128. *See supra* notes 74-80 and accompanying text.

129. *Kotecki*, 585 N.E.2d at 1027.

130. *Id.* For a discussion of these approaches, see *supra* notes 84-107 and accompanying text.

131. *Id.*

132. *Id.*

133. *See, e.g.*, LARSON, *supra* note 1, § 76.11, at 14-644.

134. Note, however, that Justice Freeman, in his dissent in *Kotecki*, argued that because the right to contribution did not exist in Illinois at the time the Workers' Compensation Act was passed (1951), it could not have been the legislature's intent to limit that right. *See infra* note 140. The

versy over the accommodation of these interests requires a clear understanding of the specific interests represented by both the Contribution Act and the Workers' Compensation and how they conflict.

Supporting the Workers' Compensation Act's no-fault system of compensation are both the interests of employees and employers. Employers' primary interest is in limiting payments to the workers' compensation scheme[135] as their sole liability for an employee's injury. The Act also recognizes employers' interest against an employee's double recovery by creating a lien on the employee's recovery from a responsible third party.[136] The Act advances employees' interest in receiving compensation for on-the-job injuries by establishing a regular, guaranteed payment schedule based upon the extent of such injuries.[137] The common law also supports this interest by providing employees with causes of action (negligence and strict products liability) against third parties responsible for those injuries; the Act effectively endorses such causes of action by not prohibiting them.[138]

The Contribution Act, on the other hand, represents a more equitable approach through a distribution of liability in accord with individual fault. It provides support for the defendant-third party's interest in limiting its liability to its established fault.[139] A defendant-third party forced to bear a damage burden which is greater than its relative fault has a strong interest in obtaining contribution from other responsible parties. If the defendant-third party is prevented from seeking contribution from another negligent party (i.e. the employer) because the employer is covered by the workers' compensation system, then the defendant-third party must pay beyond its relative fault.

Conflict between the Workers' Compensation Act and the Contribution Act emerges when a defendant files a contribution claim against an employer seeking an amount greater than the employer's workers' compensation exposure. Allowing the contribution claim would result in the employer making payments in excess of its statutory liability. There is an inherent gap between the respective liability interests of employers and

Kotecki majority, however, did not agree, and no other Illinois courts have adopted Justice Freeman's argument.

135. *See supra* notes 35-38 and accompanying text, regarding the exclusive remedy provisions.

136. *See supra* note 40 and accompanying text, regarding the employer's lien against the employee's recovery from a third party.

137. *See supra* notes 32-34 and accompanying text, regarding compensation benefits.

138. An injured employee may sue under a variety of common law actions such as negligence and strict products liability as well as such statutorily established actions as the Structural Work Act, ILL. REV. STAT. ch. 48, para. 60 (1991).

139. *See supra* notes 63-70 and accompanying text, regarding the equitable allocation of fault under the Contribution Act.

original defendants where an employer's relative fault exceeds the amount of its workers' compensation exposure. The *Kotecki* court directly confronted this conflict.

The limited contribution rule from *Kotecki* represents both statutory schemes. Where an employer is at least partially responsible for the plaintiff/employee's injury through its own negligence, both statutes are implicated. Lacking legislative guidance indicating one statute's predominance over the other, the court sought to devise a solution which gave the greatest support and balance to both statutes. The Contribution Act and the Workers' Compensation Act appear to have relatively equal weight, absent any legislative intent to the contrary.[140] A compromise was required in order for the court to achieve a balance between the competing systems. The *Kotecki* rule allows employers' liability to remain limited and also gives original defendants some relief from their verdicts. Thus, the limited contribution rule provides support to the competing interests of both statutory schemes, something which neither the no-contribution nor the unlimited contribution rules allows.

The *Kotecki* rule must be understood as a departure from prior interpretations of the right to contribution under *Skinner* and the Contribution Act. While the court stated that it had never answered the question of the amount of an employer's contribution liability, there is wide recognition that previous Illinois law did allow unlimited contribution.[141] Indeed, the court's own decisions in *Skinner* and *Doyle* implicitly suggest that the only limit on an employer's contribution was the extent of its relative fault. Through its limited contribution rule, the court has taken a step which brings Illinois closer in line with the mainstream of legal thought in the sense that an employer's exposure for an

140. *Kotecki*, 585 N.E.2d at 1029 (Freeman, J., dissenting). Justice Freeman dissented upon the denial of the rehearing petition and argued that no limit on the amount of contribution could have been intended by the Illinois legislature. His position was based in terms of statutory construction:

> In view of the facts that the current Workers' Compensation Act was enacted in 1951 . . . and that contribution among joint tortfeasors was not allowed in Illinois until this court's 1977 decision in *Skinner* . . . application of the above-stated rules to the issue in *Kotecki* can yield but one conclusion. That conclusion is that it could not have been the intent of the legislature which passed the current Workers' Compensation Act to limit to any extent the right to contribution, from an employer, of a manufacturer sued by an employee injured by a defective product. It could not have been that legislature's intent to limit that right because, as Carus concedes, contribution did not exist in Illinois at the time of the enactment of the original Workers' Compensation Act. That being the case, it was improper for this court to effectively attribute to the legislature which passed the Act an intent which it could not possibly have had at that time. Nor could this court properly conclude that, had the legislature considered the issue, it would have intended the result reached in this case.

Id.

141. *See* Cyclops' Petition for Rehearing at 3-12 (citing Illinois caselaw and various commentators).

employee's injury does not ever exceed its statutory workers' compensation liability. Yet, under the rule, some relief is provided to the third-party tortfeasor. In this manner, the court's position most fully recognizes the interests of both employers and third-party tortfeasors simultaneously.

Thus, the advantages of the *Kotecki* rule of limited contribution are clear. One federal court characterized the benefits as the following: (1) the rule preserves the economic structure of the workers' compensation system; (2) it effectuates the policy supporting contribution which the legislature advocated by passing the Contribution Act; (3) it harmonizes the Contribution Act with the Workers' Compensation Act; and (4) it protects the defendant from the inequity of bearing the entire liability for injury caused at least in part by the employer.[142]

Furthermore, the rule prevents a complete windfall to the employer under a no-contribution rule. All employers paying compensation benefits have a statutory lien over the plaintiff's recovery, up to the amount of the benefits paid. The no-contribution rule gives negligent employers a windfall because they do not have to pay damages yet they also have a lien over the plaintiff's recovery.[143]

The rule's disadvantages lie in the fact that it is a compromise, failing to give full effect to either statutory scheme. The Workers' Compensation Act and the Contribution Act must each yield to some extent under the *Kotecki* rule. Since contribution is allowed, though limited in scope, the employer does not receive the full protection and exclusive liability intended by the workers' compensation system. Because contribution is capped at a set, statutory limit, the third-party plaintiff does not receive the benefit of a complete equitable allocation of fault as envisioned under the Contribution Act. Where an employer's relative fault exceeds the amount of its potential contribution payment, the defendant/third-party plaintiff must absorb the difference. In some cases this difference may be dramatic.[144] The rule does not eliminate this inequity,

142. Newport Air Park, Inc. v. United States, 293 F. Supp. 809, 815-16 (D.R.I. 1968) (applying the Pennsylvania rule under Rhode Island law), *vacated on basis of federal law*, 419 F.2d 342 (1st Cir. 1969). The rule in *Newport Air Park* "would arguably be a fair compromise in the light of all the conflicting policy interests." LARSON, *supra* note 1, § 76.34, at 14-708. Yet Larson also notes that achieving the result by logical legal analysis is "another matter." *Id.* at 14-709. *See also* Ian M. Sherman, *Contribution from Employers: Availability, Good Faith Settlements and What the Future May Hold*, 75 ILL. B.J. 568, 575 (June 1987) (advocating application of the Minnesota rule to Illinois).

143. Larson, *supra* note 5, at 366; Burrell v. Electric Plant Bd., 676 S.W.2d 231, 235 (Ky. 1984), *overruled on other grounds*, Dix & Assoc. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 29 (Ky. 1990).

144. For example in our introductory hypothetical, *supra* text accompanying notes 8-9, the

though it avoids the harshness of the no-contribution rule. Thus, the nature of the rule as a compromise leaves the defendant/third-party plaintiff in a better position but not an optimal one.

In addition, the *Kotecki* court established a rule that is clearly result-oriented rather than analytically necessary.[145] It is apparent that the court intended to arrive at an outcome which gave effect to both statutory schemes. The court's analysis focused on the competing respective interests of employers and third-party plaintiffs under the Workers' Compensation Act and the Contribution Act.[146] In the end, the rule is a compromise between two statutory systems with weighty underlying interests rather than a declaration that one is dominant.

Furthermore, the court reached the result by adhering to somewhat dubious precedent. *Skinner* and *Doyle* have been severely criticized, particularly with respect to the holding that employers are "liable in tort" to employees.[147] Prof. Larson's analysis of a limited contribution rule is instructive on this issue.[148] He notes two legal hurdles which must be overcome in order to attain the rule. First, for employer contribution to be allowed at all where a workers' compensation system is present, the statutory language "liable in tort" must be equated with being guilty of contributing to a tort, rather than true liability in tort. Second, a limit on contribution must be arbitrarily established for policy reasons since there is no strictly legal rationale for it.[149]

The *Kotecki* court implicitly crossed these two hurdles on analytically unstable grounds. The court passed the first hurdle using *Doyle*'s unique and much criticized declaration that employers are liable in tort

plaintiff's damage was $1,000,000. The employer's workers' compensation payments were only $50,000. However, the employer's relative fault was 75%, equal to $750,000 of the verdict. Yet, under *Kotecki*, the manufacturer-third-party plaintiff can only receive the amount of the employer's workers' compensation exposure ($50,000) in contribution. This results in the manufacturer having to absorb the $700,000 difference.

145. *See* LARSON, *supra* note 1, § 76.35, at 14-710 (analyzing the *Lambertson* decision).

146. Indeed, the court stated that "the Minnesota rule provides the fairest and most equitable balance between the[se] competing interests." *Kotecki*, 585 N.E.2d at 1027.

147. *See supra* note 80 and accompanying text; *see also* Elward, *supra* note 23, at 118-20 (arguing that *Doyle*'s interpretation of the Contribution Act as a codification of *Skinner* is wrong and that employers are not "liable in tort."). Prof. Larson's criticism of *Doyle* is noteworthy:

> Both because of the literal language of the statute [the Illinois Contribution Act] and because of the coincidence in dates, it was widely assumed that the purpose and effect of the amendment was to rule out contribution on the *Skinner* facts, since in ordinary parlance, including the only usage that would be familiar to legislators, an employer has no "liability in tort" to his employee. But, incredibly, the Supreme Court of Illinois in *Doyle v. Rhodes*, [cite omitted] managed to produce the opposite result, with a morsel of semantic hair-splitting that would make any medieval theologian green with envy.

LARSON, *supra* note 1, § 76.39, at 14-728.

148. LARSON, *supra* note 1, § 76.34, at 14-709.

149. *Id.*

until the affirmative defense of the Workers' Compensation Act is asserted.[150] The second hurdle, establishing a limit on the amount of contribution, was surmounted by the court's declaration that employers must pay contribution in an amount equal to their workers' compensation liability. This limit is obviously derived from the Workers' Compensation Act. Thus, it is a satisfactory limit, given its statutory origin, since employers are not forced to pay beyond their workers' compensation exposure. Yet particularly because of the court's heavy reliance on *Doyle*, one must recognize that the result stands on "shaky" legal ground.

Finally, in cases where the employer has low workers' compensation exposure but has a high relative fault, the third-party plaintiff receives little relief and the employer incurs a windfall. Despite a low relative fault, the third-party plaintiff can only obtain the amount of the employer's workers' compensation exposure in contribution. In such a case, the third-party plaintiff must still bear a disproportionate burden by paying out to the original plaintiff in excess of its own relative fault. Thus, the employer receives a type of windfall where its total exposure is far lower than its relative fault.

IV. GOOD FAITH SETTLEMENTS AND *KOTECKI*

A. The Requirements for a Good Faith Settlement in Illinois

The Contribution Act,[151] in addition to establishing a right to contribution, provides that a tortfeasor who is given a release or covenant-not-to-sue in good faith by a claimant is discharged from all attendant liability to any other tortfeasor.[152] This discharge expressly includes contribution claims.[153]

150. Kotecki v. Cyclops Welding Corp., 585 N.E.2d 1023, 1025 (1991) (citing Doyle v. Rhodes, 461 N.E.2d 382, 386 (Ill. 1984)).

151. ILL. REV. STAT. ch. 70, para. 301-05 (1991).

152. *Id.* ch. 70, para. 302, which reads in pertinent part:

> (c) When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release of the covenant, or in the amount of the consideration actually paid for it, whichever is greater.
>
> (d) The tortfeasor who settles with a claimant pursuant to paragraph (c) is discharged from all liability for any contribution to any other tortfeasor.
>
> (e) A tortfeasor who settles with a claimant pursuant to paragraph (c) is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement.

153. *Id.* ch. 70, para. 302(d).

The result of such a settlement is that the claimant's recovery is reduced by the amount stated in the release or the actual amount paid in consideration for it, whichever is greater. *Id.* ch. 70, para. 302(c). This reduction in recovery is a type of *pro tanto* setoff, reducing the claimant's recovery by

In the context of third-party actions for contribution against employers, such as *Kotecki*, a settlement directly between the third-party defendant/employer and the original plaintiff/employee of the workers' compensation claim discharges the employer from all further liability.[154] Such a settlement would completely preclude a contribution claim by the defendant-third-party plaintiff against the employer if the settlement is held to be in good faith. Addressing the issue of how *Kotecki* specifically affects good faith settlements in these contexts requires an understanding of how Illinois courts have previously treated this requirement of good faith.

As a matter of public policy, Illinois courts have encouraged settlements between parties.[155] The Contribution Act only places the single limitation of good faith upon settlements.[156] However, it fails to define good faith. Thus, Illinois courts have struggled to provide meaning to the concept of good faith. The courts have not developed a concrete consensus as to the meaning of a good faith settlement. Indeed, because so many interpretations of good faith have been accepted, the term is scarcely a limitation at all.[157]

The very meaning of the term "good faith" has been an issue of debate. The court in *Lowe v. Norfolk & Western Ry. Co.*[158] was the first Illinois court to give a succinct definition of good faith. It held that a settlement is in good faith "when no tortious or wrongful conduct on the part of the settling defendant has been shown."[159] Ironically, the *Lowe* court, as well as subsequent courts following it, did not provide much

the amount received in the settlement. Eileen M. Walsh & Eugene G. Doherty, *Section 2-1117: Several Liability's Effect on Settlement and Contribution*, 79 ILL. B.J. 122, 123 n. 17 (1991). This is to be distinguished from a *pro rata* setoff which "reduces the nonsettling defendant's liability by an amount equal to the number of settling defendants divided by the total number of defendants." *Id.*

For an endorsement of the *pro rata* approach, see John G. Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcyle Association v. Superior Court*, 30 HASTINGS L.J. 1464, 1494-98 (1979).

154. *See, e.g.*, Wilson v. Hoffman Group, Inc., 546 N.E.2d 524 (Ill. 1989); Ellis v. E.W. Bliss & Co., 527 N.E.2d 1022 (Ill. App. Ct. 1988).

155. Ballweg v. City of Springfield, 499 N.E.2d 1373, 1380 (Ill. 1986); Rakowski v. Lucente, 472 N.E.2d 791, 795 (Ill. 1984) ("As a matter of public policy the settlement of claims should be encouraged. If we were now to add limitations not expressed in the general language of the settlement instrument or in the provisions of the Contribution Act, we would make those who desire to end litigation wary and uncertain of what they would accomplish by settlement.").

156. ILL. REV. STAT. ch. 70, para. 302(c) (1991).

157. Louis J. Perona & Claire Perona Murphy, *Good Faith Settlement Under the Contribution Act: Do Trial Courts Have Too Much Discretion?*, 20 LOY. U. CHI. L.J. 961, 984-85 (1989).

158. 463 N.E.2d 792 (Ill. App. Ct. 1982).

159. *Id.* at 803. The court found that the California contribution statute paralleled the Illinois statute and thus looked to California case law for guidance. The court approved of the then-prevailing definition from River Garden Farms, Inc. v. Superior Court, 103 Cal. Rptr. 498, 505 (Ct. App. 1972).

guidance as to the meaning of that definition, especially as to what constitutes "wrongful conduct."[160] Another definition of good faith was provided by the court in *Wasmund v. Metropolitan Sanitary Dist.*[161] It looked to whether a settlement was "within a reasonable range of the settlor's fair share."[162] Yet another position is based upon whether a settlement constitutes ample consideration to establish good faith.[163] Unfortunately, the courts have lacked uniformity and have utilized a variety of definitions, even to the point of combining existing ones together.[164]

The Illinois Supreme Court, in *Ballweg v. City of Springfield,*[165] declared that in its good faith determination, the trial court must take into account the entire circumstances surrounding the settlement.[166] Using this totality-of-the-circumstances analysis, courts have refused to place emphasis on any single factor as determinative of good faith.[167] A preliminary showing of a good faith settlement is not strictly required; however, several appellate courts have declared that the very act of settling establishes a presumption of validity and good faith.[168] Once this preliminary showing of a good faith settlement has been made, the burden shifts to the party challenging the settlement to show that it was not in good faith.[169] Because Illinois public policy encourages settlements,[170] the challenging party must establish a lack of good faith by clear and convincing evidence.[171] Indeed, this high evidentiary standard may account for the absence of virtually any appellate decisions affirming a finding of the lack of good faith in a settlement.

160. Perona & Murphy, *supra* note 157, at 963.

161. 482 N.E.2d 351 (Ill. App. Ct. 1985).

162. *Id.* at 353 (quoting *River Garden*, 103 Cal. Rptr. at 506-07).

163. *See* Doellman v. Warner & Swasey Co., 498 N.E.2d 690, 696 (Ill. App. Ct. 1986); *see also* Ballweg v. City of Springfield, 499 N.E.2d 1373, 1379-80 (Ill. 1986).

164. *See, e.g.,* Pritchard v. SwedishAmerican Hosp., 557 N.E.2d 988, 992 (Ill. App. Ct. 1990) ("A settlement may be considered made in good faith when it is based on consideration [cite omitted] and when no tortious or wrongful conduct on the part of the settling party has been shown. [cite omitted]").

165. 499 N.E.2d 1373 (Ill. 1986).

166. *Id.* at 1380; *see also* Blagg v. Illinois F.W.D. Truck & Equip. Co., 572 N.E.2d 920, 923 (Ill. 1991); Wilson v. Hoffman Group, Inc., 546 N.E.2d 524, 529 (Ill. 1989).

167. Jachera v. Blake-Lamb Funeral Homes, 545 N.E.2d 314, 317 (Ill. App. Ct. 1989).

168. Roberson v. Belleville Anesthesia Assoc., 571 N.E.2d 1131, 1134 (Ill. App. Ct. 1991); Bituminous Ins. Co. v. Ruppenstein, 501 N.E.2d 907, 909 (Ill. App. Ct. 1986); Wasmund v. Metropolitan Sanitary Dist., 482 N.E.2d 351, 353 (Ill. App. Ct. 1985).

169. *Wilson*, 546 N.E.2d at 529; Perez v. Espinoza, 484 N.E.2d 1232, 1235 (Ill. App. Ct. 1985); Barreto v. City of Waukegan, 478 N.E.2d 581, 588 (Ill. App. Ct. 1985).

170. *See supra* note 155 and accompanying text.

171. Christmas v. Hughes, 543 N.E.2d 274, 276 (Ill. App. Ct. 1989); Ruffino v. Hinze, 537 N.E.2d 871, 872 (Ill. App. Ct. 1989); McKanna v. Duo-Fast Corp., 515 N.E.2d 157, 162 (Ill. App. Ct. 1987); O'Connor v. Pinto Trucking Serv., Inc., 501 N.E.2d 263, 266 (Ill. App. Ct. 1986).

In Illinois, challenges to good faith settlements have been based on six approaches: (1) the amount of the settlement; (2) a lack of consideration supporting the settlement; (3) collusion between the parties; (4) manipulation of settlement allocation; (5) settlement as a mere tactical move by the plaintiff; and (6) a lack of meaningful discovery.[172] Notably, only one Illinois decision declaring a settlement not to have been in good faith has been upheld.[173]

A non-settling defendant may challenge a settlement between other parties by arguing that the amount of the settlement was unreasonably low. Under the ratio approach as used in Illinois,[174] the court analyzes the ratio of the amount of the settlement to the amount of damages finally awarded. Subsequent decisions have firmly rejected the ratio analysis because it relies on hindsight based on the jury's verdict, a factor unavailable to the court before trial.[175] Another method based on the amount of the settlement is the "reasonable range" test which compares the settlement amount to estimates of the settling defendant's fault and of the probable recovery by the plaintiff.[176] However, Illinois courts have apparently rejected this test because of its focus on the settlement amount as the sole means for determining good faith. The requisite totality-of-the-circumstances analysis precludes an emphasis on any one factor.[177] However, the range between the defendant's fault and the probable recovery may be utilized as a factor within the totality-of-the-circumstances analysis.

A second type of challenge to the good faith of a settlement is to

172. Perona & Murphy, *supra* note 157, at 965. While the scope of this note does not allow a full analysis of each of these types of challenges, the article by Perona and Murphy discusses each basis at length. *Id.* at 965-85. *See also* Jachera v. Blake-Lamb Funeral Homes, 545 N.E.2d 314, 317 (Ill. App. Ct. 1989).

173. Blagg v. Illinois F.W.D. Truck & Equip. Co., 572 N.E.2d 920, 924 (Ill. 1991) (based on collusion between the parties in allocating the settlement to circumvent the employer's workers' compensation lien).

While the appellate court in LeMaster v. Amsted Industries, 442 N.E.2d 1367, 1373 (Ill. App. Ct. 1982), declared the settlement between the plaintiff and his employer was not in good faith because of a lack of consideration, subsequent cases disapproved of its reasoning. *See, e.g.*, Doellman v. Warner Swasey Co., 498 N.E.2d 690, 693 (Ill. App. Ct. 1986). *LeMaster* was ultimately explicitly overruled in Wilson v. Hoffman Group, Inc., 546 N.E.2d 524, 529 (Ill. 1989).

For a discussion of a recent case in which an appellate court reversed a trial court's finding of good faith, see *infra* Postscript, at 44-45.

174. *LeMaster*, 442 N.E.2d at 1372, *overruled by* Wilson v. Hoffman Group, Inc., 546 N.E.2d 524 (Ill. 1989).

175. Doellman v. Warner & Swasey Co., 498 N.E.2d 690, 693 (Ill. App. Ct. 1986); Lowe v. Norfolk & W. Ry., 463 N.E.2d 792, 803 (Ill. App. Ct. 1984).

176. *See* Tech-Bilt v. Woodward-Clyde & Assoc., 698 P.2d 159, 167-68 (Cal. 1985). For a very thorough discussion of the reasonable range test and the policies implicated by it, see Florrie Young Roberts, *The "Good Faith" Settlement: An Accommodation of Competing Goals*, 17 LOY. L.A.L. REV. 841, 855-59, 917-35 (1984).

177. Ruffino v. Hinze, 537 N.E.2d 871, 873 (Ill. App. Ct. 1989).

argue that a lack of consideration running from the plaintiff to the settling defendant shows the absence of good faith.[178] In *LeMaster v. Amsted Indus., Inc.*,[179] the court found that a plaintiff-employee had not entered into a good faith settlement with the third-party defendant-employer because the employee had no rights to relinquish as consideration for the amount of the settlement.[180] However, a subsequent line of cases, culminating in the Supreme Court's decision in *Wilson v. Hoffman Group, Inc.*,[181] disagreed. Since employers are liable in tort to employees until they raise the Workers' Compensation Act affirmative defense, employers are potentially liable for contribution.[182] Given this risk, a release by an employee of an employer constitutes valid consideration.

The existence of collusion between the plaintiff and the settling party is another argument for establishing a lack of good faith. In *Bryant v. Perry*[183] and *Wasmund v. Metropolitan Sanitary Dist.*,[184] the non-settling defendants challenged the good faith of the settlement at issue based on the relationship between the parties. Because a family relationship existed between the settling parties, the non-settling defendants asserted that the settlements were collusive and reached solely to deprive them of their right to contribution. However, lacking greater evidence of collusion other than the mere existence of the close relationship, the courts in both cases refused to acknowledge the absence of good faith.[185]

Next, a non-settling defendant may attempt to argue that the settling parties manipulated the settlement allocation to prevent or affect the non-settling defendant's set-off rights.[186] In *Blagg v. Illinois F.W.D. Truck & Equip. Co.*[187] the plaintiff agreed to settlements with the defendant manufacturers and distributors through which the plaintiff would have received $100,000 for his injuries and his wife would have received $250,000 for loss of consortium. The non-settling defendant objected to

178. Perona & Murphy, *supra* note 157, at 972; *see also* O'Connor v. Pinto Trucking Serv., 501 N.E.2d 263, 267 (Ill. App. Ct. 1986).

179. 442 N.E.2d 1367 (Ill. App. Ct. 1982), *overruled by* Wilson v. Hoffman Group, Inc., 546 N.E.2d 524 (Ill. 1989).

180. *Id.* at 1373. The court found that the employee's exclusive remedy against the employer was under the Workers' Compensation Act. Thus, the employee had no rights to give up as consideration in exchange for the employer's offer of a lien waiver plus payment of additional cash. *Id.*

181. 546 N.E.2d 524 (Ill. 1989).

182. *See* Doyle v. Rhodes, 461 N.E.2d 382 (Ill. 1984).

183. 504 N.E.2d 1245 (Ill. App. Ct. 1986).

184. 482 N.E.2d 351 (Ill. App. Ct. 1985).

185. *Bryant*, 504 N.E.2d at 1249; *Wasmund*, 482 N.E.2d at 354.

186. Under ILL. REV. STAT. ch. 70, para. 302(c) (1991), the payment of damages by a non-settling defendant to the plaintiff is reduced by the amount of the settlement between the plaintiff and the settling parties.

187. 572 N.E.2d 920 (Ill. 1991).

the allocation of the settlements, asserting that it allowed the parties to circumvent its workers' compensation lien as plaintiff's employer.[188] The Supreme Court held that the settlement did not fairly allocate the award between the plaintiff and his wife and was indicative of bad faith.[189]

A fifth approach used to establish a lack of a good faith settlement is to argue that the plaintiff settled with the other parties in a mere tactical move to get more money from the non-settling defendant. In *Pell v. Victor J. Andrew High School*[190] the non-settling defendant argued that the other defendants' settlement was in bad faith since the plaintiff sought more than the non-settling defendant's relative fault at trial.[191] The court held that when the plaintiff, following a good settlement with the other defendants, sought more money from the non-settling defendant, there was no bad faith.[192] Thus, the mere fact of a settlement agreement which is advantageous to a party is not an indicia of bad faith.[193]

A sixth argument is that the settlement occurred when there was an absence of meaningful discovery, thus it could not have been in good faith. However, this argument was summarily rejected in *Ruffino v. Hinze*[194] where the court found that basing the good faith determination on the amount of discovery or the stage of the proceedings was inappropriate.[195]

The foregoing discussion illustrates that the concept of good faith and the means of showing a lack of good faith in settlements has not received uniform treatment in the Illinois courts. The courts have accepted a variety of definitions for the meaning of good faith. Furthermore, the totality-of-the-circumstances test, the presumption of validity, and the high evidentiary burden on parties challenging the good faith of a settlement together support the public policy of encouraging settlements. Indeed, the fact that only one decision[196] establishing an absence of good faith has been upheld indicates the courts' suspicion or disap-

188. Under the Workers' Compensation Act, no part of the wife's loss-of-consortium award can be used to reimburse the workers' compensation lien. ILL. REV. STAT. ch. 48, para. 138.5(b) (1991).

189. *Blagg*, 572 N.E.2d at 924. For a further discussion of allocation in settlement agreements in multi-party cases, see Johnson v. Belleville Radiologists, 581 N.E.2d 750 (Ill. App. Ct. 1991) (settlement held in good faith, notwithstanding allocation of settlement funds between plaintiffs such that available set-off to non-settling defendants was reduced).

190. 462 N.E.2d 858 (Ill. App. Ct. 1984).

191. *Id.* at 867.

192. *Id.*

193. McKanna v. Duo-Fast Corp., 515 N.E.2d 157, 163 (Ill. App. Ct. 1987); O'Connor v. Pinto Trucking Serv., Inc., 501 N.E.2d 263, 267 (Ill. App. Ct. 1986).

194. 537 N.E.2d 871, 873 (Ill. App. Ct. 1989).

195. *Id.*

196. Blagg v. Illinois F.W.D. Truck & Equip. Co., 572 N.E.2d 920, 924 (Ill. 1991).

proval of challenges to settlements. The current precedents present little resistance to settlements between plaintiffs and tortfeasors at all.

B. Settlement Issues Implicated by Kotecki

The change in potential employer contribution liability following *Kotecki* presents a challenge to employee-plaintiffs and employer-third-party defendants who seek to establish a good faith settlement. Prior to *Kotecki*, employers faced unlimited contribution liability; under the new rule, they only face limited liability.[197] Because courts must take a party's potential liability into consideration as part of the totality of circumstances analysis,[198] the dramatic change in the scope of employer liability resulting from *Kotecki* necessarily influences the court's good faith determination. The key question is whether this new limitation on liability will change the ability of employees and employers to engage in good faith settlements.

Settlements between employees and employers are now presumptively valid in Illinois. The reasoning of *LeMaster v. Amsted* that employer-employee settlements are inherently not in good faith[199] because of a lack of consideration is no longer accepted. The demise of this isolated case began in *Doyle v. Rhodes*.[200] The court declared that employers were "subject to liability in tort" and, thus, were not statutorily immune to contribution actions under the Workers' Compensation Act.[201] Then, in *Ballweg v. City of Springfield*,[202] the court held that parties immune from direct suit could enter into valid settlements with plaintiffs. A number of appellate decisions have applied the reasoning in *Ballweg* to good faith determinations.[203] Finally, the court in *Wilson v. Hoffman Group, Inc.*[204] found that an employee's release of an employer constituted consideration under the Contribution Act and its acceptance was a valid settlement. Thus, employer-employee settlements have attained a presumption of validity in the courts.

While an employer's potential liability has been capped, *Kotecki* does not change this presumption of validity in employer-employee set-

197. The new rule on contribution is that employers are only potentially liable for an amount up to the amount of the employer's workers' compensation liability. *See supra* notes 16-18, 130-31 and accompanying text.

198. *See supra* note 166 and accompanying text.

199. *See supra* notes 178-82 and accompanying text.

200. 461 N.E.2d 382 (Ill. 1984).

201. *Id.* at 388.

202. 499 N.E.2d 1373 (Ill. 1986).

203. *See, e.g.*, Ellis v. E.W. Bliss & Co., 527 N.E.2d 1022 (Ill. App. Ct. 1988); Dixon v. Northwestern Publishing Co., 520 N.E.2d 932 (Ill. App. Ct. 1988).

204. 546 N.E.2d 524, 529 (Ill. 1989).

tlements. The reasoning found in *Doyle*, *Ballweg*, and *Wilson* is not premised on the degree of an employer's potential liability; instead, these cases rely merely on the fact that an employer is "subject to liability in tort" and, thus, for contribution. The potential amount of contribution by a employer to a third party has not been and should not be determinative of good faith in a settlement between an employer and an employee.

On a more practical level, employers' settlement offers are likely to change dramatically following *Kotecki*. In the past, as consideration for a settlement, employers offered plaintiffs waivers of their liens on any recovery received from defendants, plus some additional "fresh money" as an incentive.[205] Since employers now have no potential liability exceeding the amount of their workers' compensation exposure, they will not have any reason to offer "fresh money" anymore.[206] The amount of their lien is the full amount for which they are potentially liable in contribution. Thus, there is no reason to offer any amount beyond that figure to a plaintiff as an incentive to settle.[207]

If they seek settlement at all, employers are likely to simply offer waivers of their liens to plaintiffs, conditioned on the plaintiffs' recovery from the original defendants, in exchange for a full release from the suit. These settlements will be presumptively in good faith, given the current good faith standard, and, thus, employers will be immune to challenge from third-party plaintiffs seeking contribution.

Furthermore, following *Kotecki*, none of the various arguments used to challenge the good faith of a settlement, discussed *supra*,[208] seriously test the good faith of settlements based solely on lien waivers. The amount of the settlement[209] is not an issue since *Kotecki* has placed a limit on employers' potential liability; one could no longer argue that the settlement amount was not reasonably within the range of an employer's liability. The lack of consideration argument[210] in employer/employee settlements has been solidly rejected by the courts in Illinois. While the collusion argument[211] may have force under unusual circumstances where there is evidence of collusion between the parties, a settlement

205. *See, e.g., id.* (waiver of $149,737 lien plus payment of $25,000 cash); *Ellis*, 527 N.E.2d at 1023 (waiver of $38,153.07 lien plus payment of $250,000 cash); Doellman v. Warner & Swasey Co., 498 N.E.2d 690, 692 (Ill. App. Ct. 1986) (waiver of $56,000 lien plus payment of $140,000).

206. *See* Geoffrey L. Gifford & Thomas G. Alvary, *Market-Based Factors that Determine the Value of the Case: the Plaintiff's Perspective*, 5 CHI. B. ASS'N REC. 27 (Sept. 1991).

207. Renee Cordes, *High Court Ruling May Reduce Employers' Willingness to Settle*, CHI. DAILY L. BULL., April 19, 1991, at 14.

208. *See supra* notes 172-95 and accompanying text.

209. *See supra* notes 174-77 and accompanying text.

210. *See supra* notes 178-82 and accompanying text.

211. *See supra* notes 183-85 and accompanying text.

based simply on a lien waiver will not be open to such an attack. Because settlements based on lien waivers do not require any allocation between parties or claims, the manipulation of settlement allocation argument[212] does not apply. Finally, other arguments, such as a settlement being merely a tactical move by the plaintiff[213] or that meaningful discovery was lacking,[214] have been discredited on their own merits; they pose no threat to the good faith of settlements based on lien waivers. Indeed, these settlements are likely to maintain the presumptive validity of the pre-*Kotecki* climate and will be very difficult to challenge.

Original defendants lose the most from this new climate. If an employer settles its workers' compensation claim with an employee for a specific amount, the original defendant receives an equal reduction in the amount of its liability to the plaintiff-employee.[215] The less the amount of the employer's settlement amount, the less the original defendant receives as a set-off. Thus, the original defendant has greater potential liability to the plaintiff-employee. Indeed, *Kotecki's* limited contribution rule causes a parallel result because original defendants may not obtain full contribution from employers.

Plaintiffs also will suffer because they are no longer likely to be offered "fresh money" from employers. In the past, employers included "fresh money" in their settlement offers in order to avoid costly contribution actions against them.[216] Plaintiffs benefitted from this incentive because of the risk of not obtaining a verdict in their direct suit against the original defendant. Now, because employers have less incentive to settle, plaintiffs can only recover significant sums in the original action itself and are unlikely to receive "fresh money" from employers.

Despite the minimal effect it has on the good faith determination, *Kotecki* has dramatically affected the strategic position of employers as third-party defendants. While Illinois public policy is to encourage settlements,[217] *Kotecki* may discourage employers from settling. Employers will now be aware of their full potential liability, and thus, going to trial poses no threat to them. Indeed, employers can attempt to prove at trial that their relative fault was less than their total workers' compensation exposure. In such cases, employers would be liable for less in contribution than the amount of their workers' compensation lien. Particularly

212. *See supra* notes 186-89 and accompanying text.
213. *See supra* notes 190-93 and accompanying text.
214. *See supra* notes 194-95 and accompanying text.
215. ILL. REV. STAT. ch. 70, para. 302(c) (1991).
216. *See* cases cited *supra* note 205.
217. *See supra* note 155 and accompanying text.

in cases where there is a large lien and potentially low relative fault, employers would not be likely to settle with plaintiffs for waiver of their liens. Ultimately, *Kotecki* may lead to more third-party actions going to trial instead of ending in settlement.

Furthermore, *Kotecki* affects the likelihood of settlements between plaintiffs and original defendants. Because a trial court has the duty to carefully protect an employer's lien,[218] "no release or settlement of claim for damages between the employee and third-party tort-feasor is valid without the written consent of the employer."[219] Without any incentive to avoid trial, employers are not likely to consent to settlements between plaintiffs and defendants if the defendant maintains its right to contribution against the employer.[220] Such a result (i.e. that employers may prevent settlements between plaintiffs and defendants) runs against the Illinois public policy of encouraging settlements.

C. *The Effect of* Kotecki *on Joint and Several Liability*

Because *Kotecki*'s limited contribution rule is likely to change the settlement climate in Illinois, it necessarily impacts the operation of a recently enacted statute, section 2-1117.[221] This provision establishes a rule of several liability[222] (i.e. proportionate liability based on fault) for defendants whose relative fault is found to be less than 25% of the total fault causing plaintiff's injury.

Prior to the passage of section 2-1117, Illinois law allowed plaintiffs to collect the entire damage award from any single defendant. Because of *Skinner* and the passage of the Contribution Act, a joint tortfeasor which paid more than its proportionate share of plaintiff's damages

218. Blagg v. Illinois F.W.D. Truck & Equip. Co., 572 N.E.2d 920, 924 (Ill. 1991).

219. Insurance Co. of N. Am. v. Andrew, 564 N.E.2d 939, 941 (Ill. App. Ct. 1990).

220. Under ILL. REV. STAT. ch. 70, para. 302(e) (1991), a tortfeasor settling with a claimant is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement.

221. ILL. REV. STAT. ch. 110, para. 2-1117 (1991), which states in pertinent part:

> Except as provided in Section 2-1118, in actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, all defendants found liable are jointly and severally liable for plaintiff's past and future medical and medically related expenses. Any defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff, shall be severally liable for all other damages. Any defendant whose fault, as determined by the trier of fact, is 25% or greater of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendants who could have been sued by the plaintiff, shall be jointly and severally liable for all other damages.

The reader should be cautioned to note that this provision has not been interpreted in any published Illinois courts opinions to date and has not been the subject of much commentary in the literature.

222. Where a tortfeasor is severally liable, "it is responsible to the plaintiff only in proportion to its degree of fault." Walsh & Doherty, *supra* note 153, at 124.

could seek contribution from any or all other joint tortfeasors.[223] But until contribution from other tortfeasors was obtained, the tortfeasor from whom the plaintiff collected the entire verdict was forced to pay beyond its own fault, even if that fault was minimal.

The passage of section 2-1117 represents an attempt to prevent minimally culpable defendants from ever having to pay more than their relative share of the plaintiff's damages. The statute protects any defendant who is responsible for less than 25% of the plaintiff's injuries from having to carry the burden of a disproportionate share of the damages. It commands that such defendants shall be severally liable (i.e. limited to their fault).[224]

The Contribution Act discharges settling tortfeasors from all further liability, including contribution.[225] Where the settlement amount falls below an amount proportionate to a tortfeasor's comparative fault, the remaining, non-settling tortfeasors must assume responsibility for the balance of the judgment. In this sense, the discharge under the Contribution Act forces non-settling parties to pay beyond their relative fault.[226] Therefore, the Contribution Act represents both the policy of encouraging settlements and the policy of equitably distributing damages, purposes which can arguably conflict at times.[227]

While the *Kotecki* rule does not create the tension between the Contribution Act and section 2-1117,[228] the rule may exacerbate it. First, as discussed *supra*,[229] *Kotecki* is likely to result in employer settlements based only on lien waivers. To the extent that this allows employers to settle more easily with original plaintiffs and get out of the suit early, this could encourage juries to place greater fault on an original defendant. Because the employer is no longer part of the suit, the only potentially responsible party left is the original defendant. Thus, where a defendant may otherwise be minimally culpable (perhaps 10-15%), an early settlement between the employer and the plaintiff-employee could increase the possibility that a jury at trial would attribute more than 25% of the total

223. ILL. REV. STAT. ch. 70, para. 302 (1991).

224. *Id.* ch. 110, para. 2-1117.

225. *Id.* ch. 70, para. 302(d).

226. Under subsection 302(c), the settlement amount is reduced from plaintiff's recovery from the other parties. Assuming that the settlement is for less than the amount of the settling party's relative fault, the other parties must absorb the difference. This is known as a "pro tanto setoff." *See* Walsh & Doherty, *supra* note 153, at 123.

227. *Id.* at 124.

228. For a thorough discussion of the relationship between these statutes, see Walsh & Doherty, *supra* note 153. The scope of this note does not allow a complete analysis of the interaction between the concepts of contribution and joint and several liability.

229. *See supra* notes 205-16 and accompanying text.

fault to the defendant. Because this crosses the statutory threshold, the defendant becomes jointly and severally liable for the entire damage amount. In such a case, the goal of section 2-1117, to establish several liability for minimally culpable defendants, would not be served.

Second, the context in which the *Kotecki* rule may arise provides an illustration of the inequities inherent to the concept of several liability and the effect of these inequities on plaintiffs' recoveries. For example, an injured employee will always receive workers' compensation benefits, but the employee may be left largely uncompensated for his or her damage in a suit against a manufacturer if the sole defendant's fault falls below the 25% threshold from section 2-1117. Even if the jury returns a $1,000,000 judgement, it may find the manufacturer only 20% at fault and the employer 80% responsible. Because of section 2-1117, the manufacturer is severally liable and only pays $200,000. This is plaintiff's sole recovery on the $1,000,000 judgment (aside from his workers' compensation benefits) since the employer cannot be sued directly by the employee. Section 2-1117 prevents the manufacturer from paying beyond its relative fault, so there is no need for a contribution action.[230] Contribution only is available when the defendant pays more than its relative share. Thus, *Kotecki*'s limitation on employer contribution liability does not affect the restrictions on a plaintiff's recovery under section 2-1117.

V. CONCLUSION

The *Kotecki* decision represents a fundamental change in the legal landscape for employers in Illinois. The rule gives a much greater recognition to the historic workers' compensation *quid pro quo* by removing the potential for limitless contribution liability. To this extent, the decision will benefit Illinois employers. While original defendant-third party plaintiffs are now forced to absorb a greater portion of the damage burden, they still have a right to limited contribution. In the majority of jurisdictions, this right does not even exist. The *Kotecki* rule gives recognition to the equitable interests of third-party plaintiffs but does not fully support them.

The effect that *Kotecki* will have on good faith settlements is indirect. While the good faith determination itself has not been affected, strategies toward settlement negotiations and trial are likely to be dramatically altered. In terms of the strength of the parties' relative positions, the balance has tipped quite heavily in employers' favor.

230. *See* Walsh & Doherty, *supra* note 153, at 124.

Employers will be able to negotiate settlements on their own terms without fearing the threat of trial.

Balancing conflicting interests and policies presents a difficult task for the courts. The *Kotecki* decision is a successful attempt to simultaneously accommodate these interests to the greatest extent possible. Future decisions will undoubtedly confront the outer ramifications of the rule and the issues it affects. For the present, Illinois employers and third-party plaintiffs must learn to adjust to the new rule and develop new litigation strategies.

VI. POSTSCRIPT

Since this Comment was written, two developments in the courts and the legislature have occurred that are worthy of noting. First, in a clear response to *Kotecki*'s limited contribution rule, a bill[231] was introduced on April 4, 1992 into the Illinois General Assembly which would have effectively reversed *Kotecki*. It would have added a provision to the Workers' Compensation Act such that nothing in the Act could limit the amount of recovery in an action for contribution brought by a third party against an employer. Thus, the bill would have prevented any limit from being placed on contribution payments by employers. *Kotecki*'s limited contribution rule would have been overruled. However, after being sent to the Labor Committee, the bill was tabled and never sent to the General Assembly for a vote. As a result, the legislature has not disturbed the *Kotecki* rule.

Second, while two Illinois appellate court decisions have addressed the *Kotecki* decision,[232] only one, *Higgenbottom v. Pillsbury Co.*, addressed the ramifications of the *Kotecki* rule and good faith settlements. In this case, the plaintiff-employee entered into a settlement agreement with his employer (Yale Enforcement Services) over his workers' compensation claim before the defendant-manufacturer (Pillsbury Co.) filed its third-party complaint against Yale seeking contribution. The terms of the settlement agreement included a lump sum payment and a commitment to provide funds for future medical treatment but Yale did not waive its lien on any recovery by the plaintiff from Pillsbury. The trial court found the settlement was in good faith and that Yale was discharged from all further liability including contribution.[233] Pillsbury, on

231. S. 2219, 87th Gen. Assembly (1991).

232. Ashley v. Evangelical Hosp. Corp., 594 N.E.2d 1269 (Ill. App. Ct. 1992); Higgenbottom v. Pillsbury Co., 596 N.E.2d 843 (Ill. App. Ct. 1992).

233. *Id.* at 846-47 (citing ILL. REV. STAT. ch. 70, para. 302(c) (1991)).

appeal, argued that as long as Yale maintained its right to assert its workers' compensation lien, the settlement could not have been made in good faith.[234]

The appellate court found that the key to the good faith of the settlement was in the amount of setoff from Pillsbury's liability to the plaintiff. Under the terms of this agreement (which did not include a lien waiver), the amount of setoff from Pillsbury's liability would not include Yale's workers' compensation payments because evidence of such payments is inadmissible at trial.[235] However, if Yale gave a lien waiver as part of the settlement, Pillsbury would have received the value of the lien as a setoff against its liability to the plaintiff.[236] Thus, by retaining its lien, Yale would have paid essentially nothing to the plaintiff-employee, and Pillsbury would have received no setoff or contribution, thus increasing its liability far beyond its pro rata share. Under these circumstances, the appellate court held that the trial court's finding of good faith in the settlement agreement was in error.[237]

234. *Id.* at 848.
235. *See* Bryntesen v. Carroll Constr. Co., 190 N.E.2d 315, 317 (Ill. 1963).
236. *See* Wilson v. Hoffman Group, Inc., 546 N.E.2d 524, 531 (Ill. 1989).
237. *Higgenbottom*, 596 N.E.2d at 854.